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No. 86-288

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner

vs.

STEPHEN R. MATTATALL,

Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF RHODE ISLAND

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State of Rhode Island

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QUESTION PRESENTED

Whether this Court should review a unanimous decision of the Supreme Court of Rhode Island reversing a conviction on two separate grounds where the state court of last resort found (1) that the defendant's custodial statements should be suppressed, because the court ruled that it "must conclude as a matter of fact that Mattatall was brought involuntarily to the police station for interrogation even though the police did not suspect him and had no probable cause to believe that he was guilty of a crime;" and (2) that statements made by the defendant after his right to counsel had attached should not have been introduced at his trial where they were made to a longtime friend who was actively cooperating with the police, where the friend initiated conversations about the pending charges, and where the defendant was not advised that the police were listening in on his telephone conversations.

Now comes the Respondent, Stephen R. Mattatall, by his attorneys, and opposes the petition of the State of Rhode Island for a writ of certiorari to the Supreme Court of Rhode Island, to review that Court's factually and legally correct opinion reversing his conviction on two separate grounds.

CITATION TO THE OPINION BELOW

The opinion of the Rhode Island Supreme Court which the petitioner seeks to have reviewed is reported as State v. Mattatall, 510 A.2d 947 (R.I. 1986), and is reproduced in the appendix hereto.

STATEMENT OF JURISDICTION

The Respondent agrees with the statement of jurisdiction as it appears in the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVLOVED

The Respondent agrees with the denotation of the constitutional provisions appearing in the petition for a writ of certiorari, but notes that the petitioner's reference to "U.S. Const. Amend. XVI, §1" is apparently intended to be a reference to U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

Custodial statements to the police. On September 24, 1984, police officers from Warwick, Rhode Island, arrived at the respondent's home where the body of one John Scanlon was lying on the kitchen floor, with a .22 caliber gun visible underneath him. The respondent made a statement which indicated that Scanlon's dealth was a suicide. Although the police maintained that the respondent was not a suspect in any crime, they transported him to the police station and placed him in an interrogation room. While the respondent was at the station, the police learned that a weapon other than the .22 caliber gun had inflicted the fatal wound, and that the death could not have been a suicide. During interrogation, the

respondent repeatedly and specifically invoked his right to remain silent. He was further interrogated nonetheless, and eventually broke down and made statements that were then used against him at trial.

Prior to trial, the respondent moved to suppress his custodial statements on the ground, inter alia, that they were the product of an arrest without probable cause, and thus, that their use violated his rights under the Fourth Amendment to the Constitution of the United States and Art. I, sec. 6 of the Rhode Island Constitution. The state did not attempt to show probable cause, but argued instead that the respondent was not a suspect, and was not in custody when he was transported to the police station unhandcuffed, in the front seat of a cruiser. The state presented a series of police witnesses who all swore under oath that the respondent was not suspected of any crime, but was taken to the police station to give a witness statement. The officer in charge of the case, Det. James Godbout, testified that although the defendant was not a suspect and was considered only a witness, he was not at liberty to refuse to go to the police station. The trial justice agreed with the state that the respondent had not been arrested; thus, he did not make any findings on probable cause. On appeal to the Supreme Court of the State of Rhode Island, the state continued to maintain that the respondent had not been arrested. The state did not argue that in any event, there was probable cause for an arrest, and did not urge the Rhode Island Supreme Court to remand for further findings, if the court were to rule that the respondent had been arrested.

In its decision reversing the respondent's conviction, the Rhode Island Supreme Court ruled that for Fourth Amendment purposes, the defendant was illegally seized when he was taken to the Warwick police station. The Court said:

> Their purpose in transporting Mattatall to the police station was investigative only. They did not suspect him of homicide or murder. Such suspicions arose later because of defendant's responses to interrogation, together with the finding of a .357 magnum in a stream near Mattatall's

> house and certain ballistic findings concerning the fact that the gunshot wound to the victim was caused by a .357 magnum. Therefore, this court must conclude as a matter of fact that Mattatall was brought involuntarily to the police station for interrogation even though the police did not suspect him and had no probable cause to believe that he was guilty of a crime.

(Opinion of the Rhode Island Supreme Court, 510 A.2d at 950, emphasis supplied). The Supreme Court of Rhode Island found that the defendant's custodial statements were "the fruits of an illegal seizure" in violation of the Fourth Amendment, and accordingly, were inadmissable at trial. 510 A.2d at 952.[1] In a petition for reargument in the Rhode Island Supreme Court, the state for the first time argued -- in a highly unconvincing manner -- that there was probable cause to arrest the petitioner for acts other than homicide, despite the fact that there had never been any attempt to show that the petitioner had been arrested on those grounds. The Rhode Island Supreme Court denied the petition for reargument.

The statements overheard by the police while listening in on the respondent's telephone conversations. While the respondent was at liberty on bail, a longtime friend of his, John Carney, told the police that the respondent had been threatening his wife, Phyllis Mattatall; that Carney had told Mattatall's wife to come to his house; and that Mattatall had called Carney's house and was very angry and threatening. The police came to Carney's home at a time when Carney thought the respondent might call again. When the respondent did call several times as anticipated, Carney had the police listen in on an extension phone, but did not tell the respondent that his conversations were being monitored by the police. During these conversations, Carney did not merely passively listen to the

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1. Because the Rhode Island Supreme Court ruled that suppression was required under the Fourth Amendment, it did not reach the respondent's exceptionally strong argument, under the Fifth Amendment and Art. I, §10 of the Rhode Island Constitution, that his statements also should have been suppressed because the police repeatedly reinitiated interrogation about the homicide after the respondent, several times, had clearly and unambiguously asserted his intention to remain silent. Edwards v. Arizona, 451 U.S. 477 (1981); Michigan v. Mosley, 423 U.S. 96 (1975).

defendant, but engaged in a dialogue with him about the pending homicide; Carney said that during two of the three calls, he, Carney, initiated the conversation about the death of John Scanlon.[2] The police were aware that at the time, the respondent was represented by counsel on the charges stemming from the death of Scanlon.

ARGUMENT

I. THIS CASE DOES NOT PRESENT THE ISSUE FRAMED IN THE STATE'S PETITION -- WHETHER THE FOURTH AMENDMENT REQUIRES SUPPRESSION OF A CONFESSION WHERE NO COURT HAS EVER FOUND THAT AN ARREST WAS UNLAWFUL -- BECAUSE HERE, THE RHODE ISLAND SUPREME COURT RULED THAT THE DEFENDANT'S ARREST WAS UNLAWFUL.

The State of Rhode Island asserts in its petition that no court has ever ruled that the respondent's custody was unlawful; the state claims that after ruling that the respondent had been arrested when he was involuntarily taken to the police station, the Rhode Island Supreme Court then "declined" to address the issue of probable cause. Petition for Writ of Certiorari at 19. These assertions are erroneous. The state never requested the trial justice or the Rhode Island Supreme Court to make a finding of probable cause; notwithstanding the state's failure to assert probable cause, the Rhode Island Supreme Court never "declined" to make such a finding. Instead, the state's highest court did rule that the respondent was arrested without probable cause, and thus, that his seizure was illegal. The Rhode Island Supreme Court said:

> For the purposes of this opinion, the court must assume that at the time Mattatall was ordered transported to Warwick police headquarters, the police had insufficient evidence to constitute probable cause to believe that defendant was responsible for the homicide, or indeed that

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2. During his direct testimony elicited by the prosecutor at the suppression hearing, Mr. Carney clearly and forthrightly testified that during the first conversation, the respondent initiated the dialogue about the death of John Scanlon, but that he, Carney, initiated the conversation about Scanlon during the next two telephone calls (Suppression hearing transcript at 187, 191-93). Thus, the trial justice's finding that Mr. Carney did not bring up the Scanlon matter, referred to in the Petition for Certiorari at 7, is without support in the record with regard to two of the three telephone conversations.

> a homicide had been committed. Their purpose in transporting Mattatall to the station was investigative only. They did not suspect him of homicide or murder. Such suspicion arose only later because of defendant's finding of a .357 magnum in a stream near Mattatall's house and certain ballistic findings concerning the fact that thegunshot wound to the victim was caused by a .357 magnum. Therefore, this court must conclude as a matter of fact that Mattatall was brought involuntarily to the police station for interrogation even though the police did not suspect him and had no probable cause to believe he was guilty of a crime.

510 A.2d at 950 (emphasis supplied). While the Rhode Island Supreme Court's use, in the first sentence quoted, of the word "assume" may be confusing to the petitioner, it is clear from a reading of the opinion that the court went on to review the testimony presented at the suppression hearing, and determined that probable cause did not exist at the time of the arrest; probable cause arose only later, the Rhode Island Supreme Court found, when the police learned that the fatal wound was not inflicted by the .22 found lying beneath the deceased, but was inflicted by a .357 magnum found a distance from the scene -- thus precluding a suicidal death. The Rhode Island Supreme Court reviewed this Court's opinions which held, "that the fruits of an illegal seizure or detention are inadmissible in evidence," 510 A.2d at 950, and ultimately concluded that the respondent's statements "were the fruits of an illegal seizure . . . ." 510 A.2d at 952. There is simply no merit to the petitioner's assertion that no court has ever determined that the respondent's arrest was unlawful.

The petitioner "readily acknowledges that based upon the record that was before the Rhode Island Supreme Court, the burden of establishing probable cause in this case is not an easy one." Petition for Writ of Certiorari at 20. The petitioner then goes on to attempt to demonstrate, for the first time directly in any court, that the police possessed probable cause to arrest the respondent for aiding suicide -- arguably not even a crime in Rhode Island -- or for possessing a firearm after a previous conviction of a crime of violence. The petitioner argues that under common law, encouraging one to commit suicide is a crime. Here, however, the respondent told the

police that he should not have shown Scanlon the gun, and made no statements that would lead a reasonable person to believe that he encouraged Scanlon to kill himself. Similarly, one officer's undetailed statement that he had had previous contact with the defendant does not constitute probable cause to believe that the defendant unlawfully possessed a weapon after a previous conviction of a crime of violence. There is no evidence to support probable cause for these crimes, and this issue, first raised in the state's petition for reargument in the Rhode Island Supreme Court, is not properly preserved for review in this Court. Finally, the petitioner is also mistaken when it asserts that the Rhode Island Supreme Court erroneously applied a subjective test to determine probable cause. A unanimous Rhode Island Supreme Court found that subjectively, the arresting officers did not even suspect the defendant, and, objectively, that they in fact "had no probable cause to believe he was guilty of a crime." Opinion of the Rhode Island Supreme Court, 510 A.2d at 950.

II. THE RHODE ISLAND SUPREME COURT PROPERLY APPLIED THE FACTS OF THIS CASE TO THE LAW SET FORTH BY THIS COURT IN MOULTON v. MAINE, ___ U.S. ___, 106 S.Ct. 477 (1985) AND AS SUBSEQUENTLY EXPLICATED IN KUHLMAN v. WILSON, ___ U.S. ___, 91 L.Ed.2d 364 (1986).

Prior to trial on these charges, the respondent, while at liberty on bail, made three telephone calls to one John Carney. Mr. Carney testified that he had been a friend of the respondent's for seven years, and that a relationship of trust existed between them (Transcript of suppression hearing, 183, 196). The respondent was unaware that Mr. Carney, although not a paid informant, was cooperating with the police and that police officers were in fact listening to these conversations on an extension phone in Mr. Carney's house. The police and Carney were aware of the pending charges. During all three conversations, Carney engaged in a dialogue with the respondent concerning the pending charges, which conversation resulted in incriminating statements used against Mattatall at trial; during one conversation, the respondent raised the topic of John Scanlon's death, but

during the two other conversations, Carney himself initated the conversations on this subject.

The petitioner wrongly asserts that the Rhode Island Supreme Court, by ordering the conversations in this unique circumstance suppressed, has created a per se exclusionary rule which applies to all statements obtained after the right to counsel has attached. Instead, that Court ruled that the factual situation presented in this case was very similar to that in Maine v. Moulton, ___U.S.___, 106 S.Ct. 477 (1985), and thus, that a similar legal result must obtain. In Moulton, as here, the person to whom the statements were made, one Colson, had a longstanding, close relationship with the defendant yet without the defendant's knowledge agreed to cooperate with law enforcement agents against the defendant as part of an investigation into threats which the defendant had made. The law enforcement agents instructed Colson not to attempt to question Moulton, but Colson did actively engage in conversation with Moulton about the pending charges, which conversation naturally elicited incriminating statements from the defendant. The police passively listened in on these conversations by electronic means. As the Rhode Island Supreme Court recognized here, although the police may legitimately investigate new criminal conduct by an accused, they may not use a friend, as in Moulton or Massiah v. United States, 377 U.S. 201 (1964), or a "sympathic" fellow prisoner, as in United States v. Henry, 477 U.S. 264 (1980), to elicit incriminating statements about pending charges for which the right to counsel has attached.

Contrary to the petitioner's assertion, this case is unlike Kuhlman v. Wilson, ___U.S. ___, 91 L. Ed. 2d 364 (1986). There, the defendant made spontaneous and unsolicited statements to a temporary cellmate with whom he had no relationship and whom he had no reason to trust. The cellmate, who reported the conversations to the authorities according to a prior agreement, did not engage in any conversation with the defendant which was likely to elicit incriminating statements; instead, he simply listened to what the defendant volunteered. In this case, by contrast, a friend, whom

the respondent had every reason to trust, actively engaged the respondent in conversations about the pending crime, which conversations where likely to and did elicit incriminating statements, while the police monitored those conversations without the respondent's knowledge. The Rhode Island Supreme Court properly applied the facts of this case to the law as established by this Court, and made no legal rulings contrary to this Court's pronouncements.

CONCLUSION

The decision of the Rhode Island Supreme Court does not present an issue framed in the petition for certiorari, and constitutes a proper application of the facts of this case to the law as set forth by this Court. Accordingly, the respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Attorney for the Respondent

Menard v. Woonsocket Teachers Guild-AFT 951, 117 R.I. 121, 363 A.2d 1349 (1976).

[3] Although we concede that the express language of the preliminary injunction did not obligate the alliance to initiate any action to terminate the strike,[3] the trial justice's determination that the alliance violated the order prohibiting it from engaging in a work stoppage or strike was based on competent evidence and was not otherwise clearly wrong.

At the hearing on the motion to adjudge the alliance in contempt, the officers testified that they did not confer with one another or any of the membership after the injunction had been issued, but rather each individual made his/her own decision to remain away from work. The trial justice, however, rejected this testimony on credibility grounds and found that once the preliminary injunction had been entered, the alliance, through its officers, communicated the message to the membership that it would adhere to the long-standing principle of no contract, no work.

[4] It is clear that the trial justice was not bound to accept the officers' testimony as credible "'merely because there [was] no direct testimony contradicting it, where it contains inherent improbabilities or contradictions, which alone, or in connection with other circumstances in evidence, satisfy [the trier of fact] of its falsity.'" *Gorman v. Hand Brewing Co.*, 28 R.I. 180, 183, 66 A. 209, 211 (1907); *see also Woonsocket Teachers' Guild*, 117 R.I. at 131, 363 A.2d at 1355.

Competent circumstantial evidence, including a complete shutdown of the Pawtucket school system, contradicted the officers' testimony and served as the legal basis for the trial justice's finding that the alliance had indeed violated the court order. As noted by the trial justice and stated in *School Committee of Pawtucket*, 117 R.I. at 210, 365 A.2d at 503, the fact that the officers of the alliance refused to comply with the injunction was telling evidence that the union, through its officers, had signaled its membership to continue the policy of no contract, no work, notwithstanding the issuance of the preliminary injunction. The display of union solidarity before the trial justice belies the alliance's claim that it and its membership during the period before, during, and after the strike were operating on completely different wavelengths.

The teachers' and the alliance's appeals are denied and dismissed, the judgments appealed from are affirmed, and the case is remanded to the Superior Court for further proceedings.

3. The trial justice expressed her belief that the injunction also required the alliance to advise the membership affirmatively that it had an obligation to go back to work. Because this oversight was not the sole basis of her decision that the alliance violated the order, it does not constitute reversible error.

STATE

v.

Stephen R. MATTATALL.

No. 85-149-C.A.

Supreme Court of Rhode Island.

June 9, 1986.

Defendant was convicted in the Superior Court, Kent County, Kiely, J., of second-degree murder, and he appealed. The Supreme Court, Weisberger, J., held that: (1) defendant, whom lieutenant ordered transported to police station, who did not have option of declining to go with police, and who reasonable person would have believed was subject to official restraint, was seized for Fourth Amendment purposes, and thus,

oral statements made by defendant during course of his detention at police station were inadmissible as fruits of illegal seizure; (2) Sixth Amendment right to counsel was applicable to defendant who had been arraigned on charge of homicide and who counsel had appeared to represent, even though defendant had not been indicted; and (3) telephone statements of defendant to individual that police listened in on should not have been admitted into evidence, where police knew or were chargeable with knowledge of facts indicating defendant's Sixth Amendment right to counsel had attached and police knowingly listened to conversations in which defendant made incriminating statements concerning pending charges.

Vacated and remanded.

1. Criminal Law ⇐394.4(9), 412.1(3)

Any fruits of detention of person in violation of Fourth Amendment rights are inadmissible, even if the fruits are oral statements for which adequate *Miranda* warnings had been given for Fifth Amendment purposes. U.S.C.A. Const.Amends. 4, 5.

2. Arrest ⇐63(4)
Criminal Law ⇐412.1(3)

Defendant, whose transport to police station was ordered by lieutenant, who did not have the option of declining to go with police, and who reasonable person would have believed was subject to official restraint due to number of police officers at scene, was seized for Fourth Amendment purposes, and thus, oral statements made by defendant during course of his detention at police station were fruits of illegal seizure that were inadmissible in evidence against him, even though police did not use physical force upon defendant and did not handcuff him, and trial court found defendant's statements to be voluntary for Fifth Amendment purposes. U.S.C.A. Const. Amends. 4, 5.

3. Criminal Law ⇐641.3(3)

Sixth Amendment right to counsel applies as soon as adversarial judicial proceedings have commenced. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.3(1)

Sixth Amendment right to counsel of defendant for whom counsel had entered appearance in case was applicable, even though defendant had not been indicted in the case, where defendant had been arraigned on charge of homicide. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐412.2(4)

Telephone statements made by defendant to individual who police officers listened in on after defendant had been arraigned on homicide charge and counsel had appeared to represent him, including statements by defendant that victim's death was accidental and not suicidal and that defendant might have been involved in accidental death, were not admissible against defendant at trial, where police knew or were chargeable with knowledge that Sixth Amendment right to counsel was applicable and counsel had entered appearance, and they knowingly listened to conversations in which defendant made incriminating statements concerning pending charges. U.S.C.A. Const.Amend. 6.

Arlene Violet, Atty. Gen., Joel S. Chase/Constance Measore, Sp. Asst. Attys. Gen., for plaintiff.

William F. Reilly, Public Defender, Janice M. Weisfeld/Barbara Hurst, Asst. Public Defenders, for defendant.

OPINION

WEISBERGER, Justice.

This case comes before us on the defendant's appeal from a judgment of conviction of second-degree murder entered after a jury trial. Thereafter, the trial justice denied the defendant's motion for new trial and sentenced him to a term of forty years' imprisonment of which ten years were suspended. The trial justice further i
an additional ten year sentence u
defendant, Stephen R. Mattatall, as
ual offender. We reverse the con
The facts of the case insofar as pert
this opinion are as follows.

On the morning of September 2
defendant's wife found the body
Scanlon on the kitchen floor of the
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Doctor Loren J. Mednick, an a
medical examiner for the state, late
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and 4 a.m. on September 24, 1982.
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At about 9:15 a.m. Sergeant
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The sergeant, admonishing defenda
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In the interrogation room Detecti
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Miranda rights at about 11 a.m.
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monitions, defendant declined to
waiver-of-rights form. Detective
continued to question Mattatall.
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had been drinking together, that
caliber gun was not owned by de

pended. The trial justice further imposed an additional ten year sentence upon the defendant, Stephen R. Mattatall, as a habitual offender. We reverse the conviction. The facts of the case insofar as pertinent to this opinion are as follows.

On the morning of September 24, 1982, defendant's wife found the body of John Scanlon on the kitchen floor of the Mattatalls' Warwick dwelling. Scanlon had apparently been shot in the face. A .22-caliber pistol was visible beneath the body. Doctor Loren J. Mednick, an assistant medical examiner for the state, later found that Scanlon had died between midnight and 4 a.m. on September 24, 1982, by reason of a fatal gunshot wound to the cheek.

At about 9:15 a.m. Sergeant Ernest Pierce of the Warwick police department arrived at the Mattatall home and observed that defendant was extremely agitated. The sergeant, admonishing defendant to sit down on the couch, asked him some questions about the .22-caliber gun but received no definitive reply. At this point Lieutenant James J. Godbout, who was in charge of the investigation, instructed Sergeant Pierce to have Mattatall transported to police headquarters in order to further the investigation as well as to get statements from Mattatall. Lieutenant Godbout testified that Mattatall was not at liberty to refuse his removal to the police station and presumably was not free to depart from the station until the investigative interrogation had been completed. Patrolman Ernest Heon drove defendant to the station in a police cruiser and then led him to an interrogation room within the detective division.

In the interrogation room Detective Richard Johnson admonished defendant of his *Miranda* rights at about 11 a.m. on September 24, 1982. In response to these admonitions, defendant declined to sign a waiver-of-rights form. Detective Johnson continued to question Mattatall, who informed the detective that he and Scanlon had been drinking together, that the .22-caliber gun was not owned by defendant, but that defendant did own a .357-magnum pistol. The defendant suggested that Scanlon had committed suicide. After about fifteen or twenty minutes of interrogation defendant told Detective Johnson that he no longer wished to discuss the matter with him.

Lieutenant Godbout returned to the police station and brought defendant to a larger interview or interrogation room. The lieutenant advised defendant of his *Miranda* rights again at about 12:30 p.m., and Mattatall signed a waiver-of-rights form at that time. Mattatall stated that he and Scanlon had been drinking the night before and that Scanlon had asked him if he owned a gun. The defendant stated that he gave Scanlon a .22-caliber gun with a single bullet and then went upstairs to bed. Thereafter, when defendant refused to sign a consent form to allow a neutron-absorption test to be administered, a warrant was obtained to perform this test in order to determine whether defendant had recently fired a gun. The test was performed and concluded at about 3 p.m. The results were negative. Thereafter, Lieutenant Godbout continued his interrogation, and Mattatall admitted that he owned a .357 magnum as well as the .22-caliber gun. The defendant refused to tell the police where the magnum was located but signed a consent form allowing the police to search his home for the gun.

At this point, defendant became more and more agitated, began to cry, and then stated that he was showing Scanlon how to work the .22-caliber gun, and that it had accidentally discharged, and struck Scanlon in the face. Lieutenant Godbout then asked defendant why he had not called the rescue squad or the police at that point. Mattatall replied that he had nothing further to say. At this point questioning was terminated, and defendant was allowed to call his attorney. Statements taken during the course of this interrogation were introduced into evidence during the trial after a motion to suppress was denied. During the suppression hearing the prosecution

took the position that since Mattatall was not under arrest when he was taken to the station and was not a suspect at that time, it was unnecessary to establish probable cause in order to justify his transportation to police headquarters and his seizure or custody for investigative purposes. The trial justice agreed that Mattatall was not arrested. No ruling was requested or made on the issue of probable cause for the detention.

Certain statements made by defendant to one John Carney after Mattatall had been arraigned and after counsel had entered an appearance on behalf of defendant also were admitted during the course of the trial. More details concerning these statements will be set forth later in this opinion. It is sufficient at this point to indicate that the conversations between defendant and Carney were overheard by the police with Carney's consent.

In support of his appeal defendant raises seven issues, only two of which will be dealt with in this opinion. Further facts will be supplied as necessary in dealing with these issues.

I

For purposes of this opinion, the court must assume that at the time Mattatall was ordered to be transported to Warwick police headquarters, the police had insufficient evidence to constitute probable cause to believe that defendant was responsible for the homicide, or indeed that a homicide had been committed. Their purpose in transporting Mattatall to the police station was investigative only. They did not suspect him of homicide or murder. Such suspicion arose later because of defendant's responses to interrogation, together with the finding of a .357 magnum in a stream near Mattatall's house and certain ballistic findings concerning the fact that the gunshot wound to the victim was caused by a .357 magnum. Therefore, this court must conclude as a matter of fact that Mattatall was brought involuntarily to the police station for interrogation even though the police did not suspect him and had no probable cause to believe that he was guilty of a crime. The purpose of this removal was investigative and was not considered by the police to be a full custodial arrest. The arrest took place later at the police station after Mattatall made certain statements that he might have intended to be exculpatory but which led the police to believe that he was involved in a homicide. We shall also assume for the purpose of this opinion that defendant was properly admonished of his *Miranda* rights and that his responses to interrogation were voluntary as found by the trial justice.

The Supreme Court of the United States has unequivocally held in a series of opinions that the fruits of an illegal seizure or detention are inadmissible in evidence, whether obtained by interrogation or otherwise. *Taylor v. Alabama*, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

[1] The foregoing cases establish the principle that if a person is detained in violation of the rights guaranteed by the Fourth Amendment to the Constitution of the United States, any fruits of the illegal detention are inadmissible even if they are oral statements, as in *Taylor*, *Dunaway*, and *Brown*, for which adequate *Miranda* warnings had been given for Fifth Amendment purposes. It was also established in *Davis v. Mississippi*, as well as in *Taylor v. Alabama*, that the taking of fingerprints during such an illegal detention will result in the exclusion of these prints from evidence.

The state argues that since Mattatall was not under full custodial arrest, his statements, if given voluntarily, should be admissible. This argument was presented in *Dunaway v. New York*, *supra*, and was

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rejected. In that case the Court obse after contrasting such investigative d tion from the brief investigative stop proved in *Terry v. Ohio*, 392 U.S. 1, Ct. 1868, 20 L.Ed.2d 889 (1968), as lows:

"[T]he detention of petitioner was in portant respects indistinguishable fro traditional arrest. Petitioner was questioned briefly where he was fou Instead, he was taken from a neighb home to a police car, transported t police station, and placed in an interro tion room. He was never informed t he was 'free to go'; indeed, he wo have been physically restrained if he h refused to accompany the officers or h tried to escape their custody. The ap cation of the Fourth Amendment's quirement of probable cause does depend on whether an intrusion of t magnitude is termed an 'arrest' und state law. The mere facts that petition was not told he was under arrest, w not 'booked,' and would not have had a rest record if the interrogation ha proved fruitless, while not insignifica for all purposes * * * obviously do n make petitioner's seizure even roughl analogous to the narrowly defined intr sions involved in *Terry* [v. *Ohio*, 39 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 88 (1968)] and its progeny. Indeed, an 'exception' that could cover a seizure a intrusive as that in this case woul threaten to swallow the general rule tha Fourth Amendment seizures are 'reason able' only if based on probable cause." *Dunaway*, 442 U.S. at 212–13, 99 S.Ct. at 2256–57, 60 L.Ed.2d at 835–36.

The Court, in *Dunaway*, rejected the same distinction between investigation and accusation that it had rejected ten years earlier in *Davis v. Mississippi*, *supra*. In *Davis*, a young man, along with forty or fifty other black youths, was detained at a police station incident to a rape investigation, was fingerprinted, and was then released. No probable cause was established for the seizure and detention of Davis. The state argued that Davis was not ar-

rejected. In that case the Court observed, after contrasting such investigative detention from the brief investigative stop approved in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), as follows:

"[T]he detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an 'arrest' under state law. The mere facts that petitioner was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes * * * obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* [v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)] and its progeny. Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway*, 442 U.S. at 212–13, 99 S.Ct. at 2256–57, 60 L.Ed.2d at 835–36.

The Court, in *Dunaway*, rejected the same distinction between investigation and accusation that it had rejected ten years earlier in *Davis v. Mississippi*, *supra*. In *Davis*, a young man, along with forty or fifty other black youths, was detained at a police station incident to a rape investigation, was fingerprinted, and was then released. No probable cause was established for the seizure and detention of Davis. The state argued that Davis was not arrested but only detained briefly for investigative purposes with a minimum intrusion during the course of fingerprinting. The Court responded with this statement:

"[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" *Davis*, 394 U.S. at 726–27, 89 S.Ct. at 1397, 22 L.Ed.2d at 680–81.

[2] There seems no question that in the case at bar defendant was seized for Fourth Amendment purposes and was detained for a substantial period of time during which he was interrogated. There is no question that the fruits of this interrogation assisted in the establishment of probable cause for his arrest and were used against him at the trial in order to obtain his conviction.

This court has had occasion to consider such detention in *State v. Bailey*, 417 A.2d 915 (R.I. 1980). In that case, we established the criteria for determining whether an arrest or seizure has taken place for Fourth Amendment purposes. These factors included: "[1] the extent to which the person's freedom of movement has been curtailed and the degree of force used by the police * * * [2] the belief of a reasonable innocent person [concerning his/her inhibition of movement] in the same circumstances * * * and [3] [the question of] whether the person had the option of not going with the police * * *." *Id.* at 917–18. Applying these factors to the instant case, one is compelled to conclude that Mattatall's freedom of movement was curtailed, certainly from the moment that Lieutenant Godbout ordered that he be

transported to the police station. Mattatall did not have the option of declining to go with the police. Moreover, the fact that there were a number of police officers at the scene would have caused a reasonable person to conclude that he was subject to official restraint. Although the police did not use physical force upon defendant and did not handcuff him, they did act under color of authority and under circumstances that would cause a reasonable person to conclude that refusal to accompany them would be ineffective.

Taking into account the relevant authorities cited above, we are of the opinion that the oral statements made by defendant during the course of his detention at the Warwick police station were the fruits of an illegal seizure in violation of the Fourth Amendment to the Constitution of the United States, and therefore, were inadmissible in evidence against him. The trial justice erred in admitting such statements on the ground that he found them to be voluntary for Fifth Amendment purposes.

II

The defendant further contends that the admission into evidence of statements that he made to John Carney over the telephone were inadmissible as violative of his Sixth Amendment right to counsel pursuant to principles enunciated in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and reaffirmed in *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), and *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), and most recently in *Maine v. Moulton*, — U.S. —, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). The facts relating to the Carney telephone conversations may be briefly stated.

Carney testified that he had asked members of the Warwick police to come to his home because of threatening telephone calls that he had received from Mattatall. While the police were present at Carney's home on December 26 and 27, 1983, calls came in from Mattatall. At Carney's invitation, members of the Warwick police department listened to these conversations and heard Mattatall state to Carney that the victim's death was accidental and not suicidal and that Mattatall might have been involved in the accidental death. These statements were used against defendant at the trial. The parties stipulated that prior to these dates defendant had been arraigned on the charge of homicide and that counsel had appeared to represent him. Evidence indicates that the police officers who listened in on the conversations were aware of the pending homicide charges against Mattatall.

The state argues that this case is distinguishable from *Massiah* and *Henry* because in those cases federal officers had arranged for a person to listen to admissions made by a defendant who had been charged with a crime and for whom counsel had entered an appearance. The surreptitious "eavesdropping" had occurred under circumstances in which the officers had reason to believe that the listening individuals (a friend whose car was wired for sound in *Massiah* and a "sympathetic" fellow prisoner who listened in *Henry*) would elicit incriminating statements from the accused. Here the state argues that the officers were motivated to investigate a separate crime, that of threatening phone calls, not to obtain information concerning the pending charge. The state further contends that the police officers did not instigate the phone calls but only listened to calls initiated by Mattatall himself.

This case is very similar to *Maine v. Moulton, supra*. In that case police had learned from a codefendant turned informant that he suspected that he had received threatening telephone calls from an anonymous source concerning his pending charges. He also stated that Moulton had suggested the killing of a prosecution witness. The police then wired the codefendant for sound, with his consent, and recorded conversations between the codefendant and Moulton. During the course of these conversations, Moulton made a number of

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[3-5] The Supreme Court of the
States, in passing upon the prose
argument that there was a duty
appropriate interest in investigating
additional crimes, made the followi
ment:

"The police have an interest in t
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formal charges have already be
They also have an interest in inv
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tions of either type of crime may
surveillance of individuals alread
indictment. * * * In seeking
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the Government's investigative
are limited by the Sixth Am
rights of the accused. To allow
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accused in violation of his Sixth
ment rights whenever the police
an alternative, legitimate reason
surveillance invites abuse by
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were also investigating other cri
in obtaining this evidence, the S
lated the Sixth Amendment by kn
circumventing the accused's righ
assistance of counsel." — U.S.
106 S.Ct. at 489-90, 88 L.E
498-99.

The fact that Mattatall had n
indicted in this case is of no cons
since the Sixth Amendment right to
applies as soon as adversarial judi
ceedings have commenced. *Brewer*

incriminating statements concerning the pending charges. These statements were admitted against him at trial. Both the Supreme Judicial Court of Maine and the Supreme Court of the United States held that these statements were improperly admitted.

[3-5] The Supreme Court of the United States, in passing upon the prosecution's argument that there was a duty and an appropriate interest in investigating new or additional crimes, made the following comment:

"The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. * * * In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*. * * * Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." — U.S. at —, 106 S.Ct. at 489-90, 88 L.Ed.2d at 495-99.

The fact that Mattatall had not been indicted in this case is of no consequence since the Sixth Amendment right to counsel applies as soon as adversarial judicial proceedings have commenced. *Brewer v. Williams, supra; Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). There is no question that the Sixth Amendment right to counsel was applicable in this case, that counsel had entered an appearance in the case, that the police knew or were chargeable with knowledge of this set of facts, and that they knowingly listened to conversations in which defendant made incriminating statements concerning pending charges. However justifiable it may have been for the police to take this action for the purpose of investigating other criminal conduct, the plain message of *Moulton* is that the prosecution may not use evidence obtained regarding the pending charges against the defendant at his trial. Whether the police use a telephone, an electronic device, or a jailmate to obtain this information is not controlling. The doctrine established by the Supreme Court of the United States requires that such information not be used in evidence against the defendant on the charge in respect to which the right to counsel has previously attached. Therefore, testimony concerning the statements made to Carney should not have been admitted into evidence.

Because of the conclusions that we have reached in regard to the issues previously discussed in this opinion, it is unnecessary for us to discuss and analyze the additional five issues that have been raised by the defendant. Obviously, since the conviction of the defendant on the murder charge is to be vacated, the consecutive sentence imposed as a habitual offender must be vacated as well. The other issues raised do not require discussion at this time since they will not necessarily be presented in the same fashion at a subsequent trial.

For the reasons stated, the defendant's conviction is hereby vacated and the papers in the case are remanded to the Superior Court for a new trial.

BEVILACQUA, C.J., did not participate.